

**THE GENERAL ASPECTS
OF
TURKISH PERSONAL DATA PROTECTION LAW**

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A. The General Aspects of Turkish Personal Data Protection Law

The Personal Data Protection Law No. 6698 came into force in 2016 and all companies that process personal data are obliged to comply with a series of procedures regarding the protection of personal data, and excessive sanctions are imposed if these procedures are not complied with or a breach of data security occurs. Although many companies assume that they do not process personal data, numerous personal data have been processing by them, those data belong to; employees in personnel files, company officials in contracts signed between companies, employees of other companies in invoices, shipping documents or delivery notes, cookies at website of the company, or visitors in camera recordings. For this reason, regardless of the company's field of activity, size, or the density, category or number of personal data processed by the company, all companies are obliged to perform the necessary procedures to protect personal data and to anticipate possible risks and take necessary administrative and technical measures in order to prevent any data breach. In this context, the general overview with regard to the Turkish Personal Data Protection Law will be presented in this study.

B. Personal Data Protection Authority (KVKK):

Personal Data Protection Authority, which is a public legal entity and has administrative and financial autonomy, has been established in Ankara in 2017 to carry out duties conferred on it under the Personal Data Protection Law No. 6698. The Authority is affiliated to the Minister of Justice. The Authority is composed of the Presidency and the Board which is the decision making body of the Authority. The Board has regulatory and supervisory duties and powers to examine whether the personal data are processed in compliance with the laws, **upon complaint of data subject, or ex officio** where it learns about the alleged violation, to determine the adequate measures, to deliver its opinion about draft legislation prepared by other institutions or organizations that contain provisions on personal data, to carry out regulatory acts on the matters concerning duties, powers and responsibilities of the data controller and of its representative, to decide on the imposition of administrative sanctions provided in the Law.

As a result, the role of the Board in the field of protection of personal data is very important with its authority to regulate practices related to personal data; to inspect companies and to impose necessary sanctions in case of data breach.

C. Personal Data Protection Law No. 6698:

The effective date of the Personal Data Protection Law No: 6698 is 07.04.2016. The scope of the Law is explained in Article 2 as follow: “*The provisions of this Law shall apply to natural persons whose personal data are processed and to natural or legal persons processing such data wholly or partially by automated means or by non-automated means which provided that form part of a data filing system.*”.

1. Basic Terms in Personal Data Protection Law:

- *Data subject* is used in the Law to refer to **only natural person** whose personal data are being processed.
- *Data Controller* is the **natural or legal person** who determines the purposes and means of processing personal data and is responsible for the establishment and management of the data filing system.
 - ✓ Public legal entities are also regarded as data controller.
 - ✓ Although the data controller resides abroad, in case it operates in Türkiye, it processes the personal data of data subjects residing in Türkiye, the provisions of the Law will also apply to it.
- *Personal data* means any information relating to an identified or identifiable natural person.
- *Processing of personal data* means any operation which is performed on personal data, wholly or partially by automated means or non-automated means which provided that form part of a data filing system, such as collection, recording, storage, protection, alteration, adaptation, disclosure, transfer, retrieval, making available for collection, categorization, preventing the use thereof.
- *Data Processor* means the natural or legal person who processes personal data on behalf of the data controller upon its authorization.
- *Explicit consent* means freely given, specific and informed consent. Explicit consent is not subject to any form requirement, however the burden of proof is on data controller.
- *Special categories of personal data* is personal data relating to the race, ethnic origin, political opinion, philosophical belief, religion, religious sect or other belief, appearance, membership to associations, foundations or trade-unions, data concerning health, sexual life, criminal convictions and security measures, and the biometric and genetic data are deemed to be special categories of personal data.

- *Data Controllers' Registry (VERBİS)* is a registration system where data controllers shall be registered to and record the data processing activities they are engaged with. Persons processing personal data by non-automated means which provided that form part of a data filing system, attorneys at law, notaries, political parties, associations, foundations and trade unions which process personal data that are in compliance with relevant legislation and purposes and limited to its field of activity, certified public accountants and sworn-in certified public accountants, customs brokers, mediators, natural or legal person data controllers whose number of employees annually is less than 50 and annual financial balance sheet total is less than 100 million TL (*the limit is increased from 25 million TL to 100 million TL with the Board decision dated 06.07.2023 and numbered 2023/1154*), whose main field of activity is not sensitive personal data processing are exempted from the obligation of the registration to VERBİS with the decisions of the Board.
 - For data controllers residing abroad to register VERBİS, the exception criteria such as the number of employees and the financial balance sheet shall not apply.

2. Key Principles for Processing of Personal Data:

Article 4 of the Law regulates key principles which state that data must be:

- Processed lawfully and fairly.
- Accurate and where necessary, kept up-to-date.
- Processed for specified, explicit and legitimate purposes.
- Relevant, limited and proportionate to the purposes for which they are processed.
- Retained for the period of time determined by the relevant legislation or the period deemed necessary for the purpose of the processing.

3. Obligation of Data Controller to Inform:

At the time when personal data are obtained, the data controller or the person authorized by it is obliged to inform the data subjects about the following:

- a) the identity of the data controller and of its representative, if any,
- b) the purpose of processing of personal data,
- c) to whom and for which purposes the processed personal data may be transferred,
- ç) the method and legal basis of collection of personal data,
- d) other rights referred to in Article 11.

4. Conditions for Processing of Personal Data:

As per Article 5 of the Law, processing of personal data shall only be exercised in case of the existence of following provisions.

- (1) Personal data shall not be processed without explicit consent of the data subject.
- (2) Personal data may be processed without seeking the explicit consent of the data subject only in cases where one of the following conditions is met:
 - ✓ It is explicitly provided for by the laws,
 - ✓ It is necessary for the protection of life or physical integrity of the person himself/herself or of any other person, who is unable to explain his/her consent due to the physical disability or whose consent is not deemed legally valid,
 - ✓ Processing of personal data of the parties of a contract is necessary, provided that it is directly related to the establishment or performance of the contract.
 - ✓ It is necessary for compliance with a legal obligation to which the data controller is subject.
 - ✓ Personal data have been made public by the data subject himself/herself.
 - ✓ Data processing is necessary for the establishment, exercise or protection of any right.
 - ✓ Processing of data is necessary for the legitimate interests pursued by the data controller, provided that this processing shall not violate the fundamental rights and freedoms of the data subject.

5. Conditions for Processing of Special Categories of Personal Data:

Article 6 regulates the conditions for processing of special categories of personal data as follows:

- It is prohibited to process special categories of personal data without explicit consent of the data subject.
- Special categories of personal data, except for data concerning health and sexual life, may be processed without seeking explicit consent of the data subject, in the cases provided for by laws. Personal data concerning health and sexual life may only be processed, without seeking explicit consent of the data subject, by the persons subject to secrecy obligation or competent public institutions and organizations, for the purposes of protection of public health, operation of preventive medicine, medical

diagnosis, treatment and nursing services, planning and management of health-care services as well as their financing.

6. Rights of the Data Subject:

In accordance with the Art. 11 of the Law, each person has the right to request to the data controller about him/her;

- a) to learn whether his/her personal data are processed or not,
- b) to demand for information as to if his/her personal data have been processed,
- c) to learn the purpose of the processing of his/her personal data and whether these personal data are used in compliance with the purpose,
- ç) to know the third parties to whom his personal data are transferred in country or abroad,
- d) to request the rectification of the incomplete or inaccurate data, if any,
- e) to request the erasure or destruction of his/her personal data under the conditions referred to in Article 7,
- f) to request reporting of the operations carried out pursuant to sub-paragraphs (d) and (e) to third parties to whom his/her personal data have been transferred,
- g) to object to the occurrence of a result against the person himself/herself by analyzing the data processed solely through automated systems,
- ğ) to claim compensation for the damage arising from the unlawful processing of his/her personal data.

7. Transfer of Personal Data Abroad:

As required under Article 9 of the Law, a cross-border transfer may take place in one of the following cases that;

- The data subject has given his explicit consent,
- The country is approved by Board as “Adequate Country” and existence of the circumstances provided for in second paragraph of Article 5 and third paragraph of Article 6 of the Law,
- If the country is not approved by Board as “Adequate Country”, then data controllers in Turkey and abroad commit in writing to provide an adequate level of protection and the Board has authorized this transfer where existence of the circumstances referred to in second paragraph of Article 5 and third paragraph of Article 6 of the Law.

8. Application to Data Controller:

In accordance with the Art.13 of the Law, the data subject shall make the requests relating to the implementation of this Law to the data controller in writing or by other means to be determined by the Board.

The data controller shall conclude demands in the request within the shortest time by taking into account the nature of the demand and at the latest within thirty days and free of charge. However if the action requires an extra cost, fees may be charged in the tariff determined by the Board. The data controller shall act on the request or refuse it together with justified grounds and communicate its response to the data subject in writing or by electronic means.

9. Complaint to the Board:

Article 14 of the Law regulates the Complaint to the Board. If the request from data controller is refused, the response is found insufficient or the request is not responded within the specified time period, the data subject may lodge a complaint with the Board within thirty days as of he or she learns about the response of the data controller, or within sixty days as of the request date, in any case. Application to data controller is the procedural requirement before making a complaint to the Authority.

To enable data subjects to submit their complaint to the Authority more quickly and effectively, the KVKK Complaint Module has been put into service as of 09.01.2020 at the official website of the Authority.

10. The Sanction of Breach of the Law:

The Board shall impose administrative fine for data controllers who

- do not fulfil the obligation to inform provided for in Article 10,
(with the rate of revaluation for the year 2023, it is from 29.852 Turkish Liras to 597.191 Turkish Liras)
- do not fulfil the obligations related to data security provided for in Article 12,
(with the rate of revaluation for the year 2023, it is from 89.571 Turkish Liras to 5.971.989 Turkish Liras.)
- do not fulfil the decisions issued by the Board pursuant to Article 15,
(with the rate of revaluation for the year 2023, it is from 149.285 Turkish Liras 5.971.989 to Turkish Liras)

- act contrary to the obligations for registry with the Data Controllers' Registry and for notification provided for in Article 16.

(with the rate of revaluation for the year 2023, it is from 119.428 Turkish Liras to 5.971.989 Turkish Liras)

In the event that the actions listed in the above paragraph be committed within the public institutions and organizations as well as the public professional organizations, the disciplinary provisions shall be applied to the civil servants and other public officers employed in the relevant public institutions and organisations and those employed in the public professional organizations upon the notice of the Board and the result is reported to the Board.

The right to compensation, under the general provisions, of those whose personal rights are violated, is reserved, however the Board does not decide about the compensation demand of the data subject even in case of the breach of the Law.

One of the most controversial points of the Law is the administrative fines, in which the range between minimum and maximum fines are excessive. As it is seen in the above figures, companies which do not take the necessary measures in the field of personal data protection are likely to face excessive fines. As a matter of fact, the Board imposed an administrative fine of 1,950,000 Turkish Liras, which is the maximum amount for 2021, for WhatsApp LLC, which transferred personal data without express consent, not acting in accordance with the necessary procedures¹. In the same year, for Yemeksepeti, which reported that customer information was stolen, it was decided to impose an administrative fine of 1,900,000 Turkish Liras not to take all necessary technical and organizational measures to provide an appropriate level of security².

The Authority has imposed approximately 85.483.000 Turkish Liras of total fines since its establishment as announced in its 2022 Annual Activity Report³, and those sanctions are an indicator of the Authority's driving force for companies to comply with the Law as soon as possible in the field of personal data protection.

¹ <https://www.kvkk.gov.tr/Icerik/7045/WHATSAPP-UYGULAMASI-HAKKINDA-YURUTULEN-RESEN-INCELEMEYE-ILISKIN-KAMUOYU-DUYURUSU>.

² <https://www.kvkk.gov.tr/Icerik/7168/2021-1324>.

³ <https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/eaf2f71e-efa5-48e2-9326-9b7fa2813193.pdf>.

11. Exemptions:

Article 28 of the Law explains the exemptions from the Law in two categories.

- For the first category, the provisions of this Law shall not be applied in the following cases where:

a) personal data are processed by natural persons within the scope of purely personal activities of the data subject or of family members living together with him/her in the same dwelling provided that it is not to be disclosed to third parties and the obligations about data security is to be complied with.

b) personal data are processed for official statistics and provided that they are being anonymized for the purposes for such as research, planning and statistics.

(c) personal data are processed with artistic, historical, literary or scientific purposes, or within the scope of freedom of expression provided that national defense, national security, public security, public order, economic security, right to privacy or personal rights are not violated or the process doesn't constitute a crime.

(ç) personal data are processed within the scope of preventive, protective and intelligence activities carried out by public institutions and organizations duly authorized and assigned by law to maintain national defense, national security, public security, public order or economic security.

(d) personal data are processed by judicial authorities or execution authorities with regard to investigation, prosecution, judicial or execution proceedings.

- The second paragraph of Article 28 explains the partial exemptions from the Law; provided that it is in compliance with and proportionate to the purpose and fundamental principles of this Law, Article 10 regarding the data controller's obligation to inform, Article 11 regarding the rights of the data subject, excluding the right to claim compensation, and Article 16 regarding the obligation to register with the Data Controllers' Registry shall not be applied in the following cases where personal data processing:

a) is necessary for the prevention of committing a crime or for crime investigation.

b) is carried out on the data which are made public by the data subject himself/herself.

c) is necessary for performance of supervision or regulatory duties and disciplinary investigation and prosecution to be carried out by the assigned and authorised public institutions

and organizations and by public professional organizations, in accordance with the power conferred on them by the law,

ç) is necessary for protection economic and financial interests of State related to budget, tax and financial matters.

D. The Principle of Evaluating Each Concrete Case as Per Its Own Elements

One of the most important issues that are ignored regarding Personal Data Protection Law is the necessity of evaluating each concrete case within its own elements. Since it is different for each company; the legislation, regulations and contracts, subject to are, the compliance process to be carried out must be tailor-made for the company.

As a general rule, processing personal data with the explicit consent of data subject complies with the Law, on the other hand, obtaining the consent by making it the condition for service of the company may be considered as a breach of the Law as it is not given freely.

For this reason, it is necessary; to analyze each personal data processing situation independently, to examine the legislation and contracts which company is subject to, and to ensure that the compliance process to be carried out is specific to the company.

RESERVATIONS

We have the following reservations;

- This legal study is prepared only with respect to referred related legislation and documents existing on the date hereof;
- This legal study is prepared by Sariibrahimoğlu Law Office and is not to be relied upon by any other person or for any other purpose without our consent.

✓ Please do not hesitate to contact if you have any questions or comments on this legal study or need any further clarifications in regard to the subject matter of this legal study.